

**Lewis, Judith**

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**From:** Jennifer Duggan <jduggan@environmentalintegrity.org>  
**Sent:** Monday, August 18, 2014 12:24 PM  
**To:** FOIA HQ  
**Cc:** Alicea, Jezebele  
**Subject:** Freedom of Information Act Request Re Steam Electric Power Generating Category Effluent Limitation Guidelines  
**Attachments:** 2018\_08\_18\_FINAL\_FOIA Request\_Steam Electric ELG Rule Post Comment Data.pdf

Dear FOIA Officer:

Please see the attached request for information on behalf of Environmental Integrity Project, Earthjustice, Clean Water Action, Waterkeeper Alliance, and Sierra Club pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Environmental Protection Agency's (EPA) FOIA regulations, 40 C.F.R. § 2.107. This request is focused on information related to the EPA's proposed effluent limitation guidelines for the Steam Electric Power Generating Category. If you have any questions related to this request, please do not hesitate to contact me at the number below.

Best,

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***\*\*Please note new address\*\****

August 18, 2014

*Sent Via Email*

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
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**RE: *Freedom of Information Act Request Re Steam Electric Power Generating Category Effluent Limitation Guidelines***

Dear FOIA Officer:

This is a request for information on behalf of Environmental Integrity Project, Earthjustice, Clean Water Action, Waterkeeper Alliance, and Sierra Club (collectively, Public Interest Groups) pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Environmental Protection Agency's (EPA) FOIA regulations, 40 C.F.R. § 2.107. This request is focused on information related to the EPA's proposed effluent limitation guidelines for the Steam Electric Power Generating Category (Steam Electric ELGs or Steam Electric ELGs Rule).

The Public Interest Groups request a fee waiver and expedited processing for this request.

## **I. Records Requested**

Coal-fired power plants are by far the largest dischargers of pollution in the United States, dumping billions of pounds of arsenic, selenium, chromium, and other dangerous pollution into our rivers, streams, and lakes each year.<sup>1</sup> The current Steam Electric ELGs have not been revised since 1982 and contain no limits for metals associated with coal combustion waste discharges.<sup>2</sup> EPA has stated that the current standards “do not adequately address the pollutants being discharged and have not kept pace with changes that have occurred in the electric power industry over the last three decades.”<sup>3</sup> Without federal standards to reduce or eliminate these discharges, state permitting agencies routinely fail to set any limits on this pollution. In fact, nearly 70% of discharge permits for coal-fired power plants allow unlimited discharges of arsenic, boron, cadmium, mercury, and selenium in violation of the Clean Water Act.<sup>4</sup> EPA has made clear that affordable treatment technologies are available to clean up and, in some cases,

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<sup>1</sup> See Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category; Proposed Rule, 78 Fed. Reg. 34,432 (June 7, 2013).

<sup>2</sup> See 40 C.F.R. Part 423.

<sup>3</sup> 74 Fed. Reg. 55,837, 55,839 (Oct. 29, 2009).

<sup>4</sup> EIP et al., Closing the Floodgates: How the Coal Industry is Poisoning Our Water and How We Can Stop It (July 23, 2013), available at [http://www.environmentalintegrity.org/news\\_reports/07\\_23\\_2013.php](http://www.environmentalintegrity.org/news_reports/07_23_2013.php)

eliminate these dangerous and illegal discharges.<sup>5</sup> Thus, strong national standards to curb water pollution from coal-fired power plants are critical to protect public health and the environment.

On June 7, 2013, EPA published a proposed rule to strengthen the controls on discharges from steam electric power plants by revising technology-based effluent limitations guidelines and standards for the Steam Electric Power Generating point source category. In the proposed rule, EPA introduced several options to control toxic discharges from coal-fired power plants and estimated the costs, pollutant loading reductions, and public health and environmental impacts associated with each option. After the public comment period closed in the Fall of 2013, EPA sent at least seven letters to utility companies and a trade association requesting additional data to evaluate industry comments. The Public Interest Groups are participating in the rulemaking process and require timely access to technical data relevant to the Steam Electric ELGs Rule. The Public Interest Groups therefore request the following records:

1. Utility Water Act Group's response to EPA's December 30, 2013 request for additional information about fly ash and bottom ash;
2. We Energies' response to EPA's January 17, 2014 request for additional information about flue gas desulfurization (FGD) wastewater characterization and treatment performance for the Pleasant Prairie Power Plant;
3. NRG Energy's response to EPA's January 17, 2014 request for additional information about FGD wastewater characterization and treatment performance for the Keystone Generating Station;
4. FirstEnergy Corporation's response to EPA's January 17, 2014 request for additional information about FGD wastewater characterization and treatment performance for the Hatfield's Ferry Power Station;
5. Duke Energy's response to EPA's January 27, 2014 request for additional information about FGD wastewater characterization and treatment performance and bottom ash wastewater characterization for the Miami Fort Station, Allen Steam Station, Belews Creek Station, Mayo Plant, Roxboro Steam Plant, and Cliffside Steam Station;
6. American Electric Power's response to EPA's February 6, 2014 request for additional information about FGD wastewater characterization and treatment performance for the Mountaineer Plant; and
7. Hoosier Energy Rural Electric Cooperatives' response to EPA's March 10, 2014 request for additional information about fly ash and bottom ash wastewater characterization.

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

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<sup>5</sup> See, e.g., Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 78 Fed. Reg. 34,432 (June 7, 2013). See also U.S. Env'tl. Prot. Agency, Steam Electric Power Generating Point Source Category: Final Detailed Study Report (EPA 821-R-09-008) (Oct. 2009), available at <http://www.epa.gov/waterscience/guide/steam/finalreport.pdf>.

FOIA requires that you respond within 20 days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must “at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions[, if any, you] will claim with respect to any withheld documents.” *Citizens for Responsibility and Ethics in Washington v. F.E.C.* 711 F.3d. 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. The Public Interest Groups request electronic copies of the records whenever possible.

## **II. Claims of Exemption from Disclosure**

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency’s justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

## **III. Fee Waiver**

Pursuant to 5 U.S.C. § 552(a)(4)(iii) and 40 C.F.R. § 2.107, the Public Interest Groups request that EPA waive all fees associated with responding to this request because the groups seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Public Interest Groups request that it reduce them to the extent possible.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>6</sup> EPA’s FOIA regulations contain an identical requirement.<sup>7</sup> The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under

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<sup>6</sup> 5 U.S.C. § 552(a)(4)(iii).

<sup>7</sup> 40 C.F.R. § 2.107.

FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.<sup>8</sup> These factors are:

A. Disclosure of the Information 'is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.'

(1) **The subject of the request:** Whether the subject of the requested records concerns 'the operations or activities of the government';

(2) **The informative value of the information to be disclosed:** Whether the disclosure is 'likely to contribute' to an understanding of government operations or activities;

(3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to 'public understanding'; and

(4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute 'significantly' to public understanding of government operations or activities.

B. Disclosure of the Information 'is Not Primarily in the Commercial Interest of the Requester.'

(1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is 'primarily in the commercial interest of the requester.'<sup>9</sup>

The Public Interest Groups' request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

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<sup>8</sup> See, e.g., Stephen J. Markman, U.S. Dep't of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that "for a request to be in the 'public interest,' four criteria must be satisfied," and citing agency's multi-factor fee waiver regulation).

<sup>9</sup> See Markman, *supra* note 8.

## **A. Public Interest Factor**

The disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”<sup>10</sup> The Public Interest Groups’ request complies with each of the criteria DOJ has identified for the public interest factor.

### **i. The request concerns the operations or activities of the government.**

The Public Interest Groups’ seek technical data relevant to EPA’s Steam Electric ELGs Rule. Since EPA is an arm of the federal government, there is no question that the information related to the rulemaking is an “operation[] or activit[y] of the government.”<sup>11</sup>

### **ii. The disclosure is “likely to contribute” to an understanding of government operations and activities.**

The technical data the Public Interest Groups have requested bear upon the legal, scientific, and technical basis for EPA Steam Electric ELGs Rule. As such, these records are of vital importance to evaluating the proposed rule and are necessary for the public to critically assess and fully evaluate EPA’s proposal to control toxic discharges from coal-fired power plants. Thus, disclosure is “likely to contribute” to public understanding.<sup>12</sup>

### **iii. The information will contribute to the understanding of the general public.**

This information will contribute to the understanding of the general public.<sup>13</sup> The general public is already following issues related to water pollution from coal-fired power plants. For example, EPA received approximately 450,000 comments on a proposed rule to regulate coal ash disposal.<sup>14</sup> And water pollution from coal-fired power plants has routinely been the focus of investigative reports by members of the media.<sup>15</sup> Thus, EPA’s Steam Electric ELGs Rule will receive close and critical scrutiny from members of the public and the news media.

The Public Interest Groups are particularly able to ensure that the information requested will be disseminated to the general public. The Sierra Club is the nation’s oldest and largest grassroots environmental organization, with nearly 600,000 members and hundreds of thousands additional online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through a radio show, an extensive online information system, web videos, and news reports.

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<sup>10</sup> See 40 C.F.R. § 2.107(l)(2)(i).

<sup>11</sup> *Id.*

<sup>12</sup> See 40 C.F.R. § 2.107(l)(2)(ii).

<sup>13</sup> See 40 C.F.R. § 2.107(l)(2)(iii).

<sup>14</sup> See, e.g., Kristen Lombardi, The Center for Public Integrity, *As EPA Delays New Coal Ash Rules, Residents Turn to the Courts for Relief*, Feb. 22, 2013, available at <http://www.publicintegrity.org/2013/02/22/12223/epa-delays-new-coal-ash-rules-residents-turn-courts-relief>.

<sup>15</sup> See, e.g., Charles Duhigg, N.Y. Times, *Cleansing the Air at the Expense of Waterways*, Oct. 12, 2009, available at <http://www.nytimes.com/2009/10/13/us/13water.html>.

The Sierra Club's Beyond Coal campaign is a multi-million dollar effort to "replace dirty coal with clean energy by mobilizing grassroots activists in local communities to advocate for the retirement of old and outdated coal plants and to prevent new coal plants from being built."<sup>16</sup> As part of its campaign, Sierra Club has prioritized its efforts to ensure that coal-fired power plants comply with the Clean Water Act and other environmental laws, and has an active communications, organizing, and litigation campaign to further these efforts. The campaign participates in dozens of proceedings annually, has a large communications budget, and communicates weekly with tens of thousands of citizens. Campaign experts and attorneys use available information to develop reports, media materials, and litigation briefs that further educate the public and decision-makers. Through that campaign, Sierra Club has built an extensive national network of public organizations and individuals interested in these issues, and it communicates with them regularly.

Earthjustice is a non-profit public interest law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment.<sup>17</sup> Earthjustice has made safeguarding the nation's waters one of its top. To this end, Earthjustice has brought numerous lawsuits to enforce the Clean Water Act in the public interest. In light of its substantial legal expertise, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Water Act. In addition, Earthjustice has the "ability and intention" to convey this information to the public.<sup>18</sup> Earthjustice can publicize information received from this request in its monthly electronic newsletter, which serves approximately 223,000 subscribers, and it can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Earthjustice's communications staff can disseminate newsworthy information obtained from this request to the media, and Earthjustice's lobbyists can provide relevant information obtained from this request to elected officials in Washington.

Clean Water Action is a non-profit, non-partisan public interest organization. One of the nation's largest grassroots environmental organizations, it was founded to protect the environment, health, economic well-being, and community quality of life by promoting safe water and preventing health threatening pollution. Clean Water Action has continuously worked to strengthen and preserve key drinking water protections and protect small streams and wetlands. With over one million members, Clean Water Action has led hundreds of successful campaigns in dozens of states around the country. Clean Water Action disseminates information on its website by blogging, publishing monthly newsletters, reports, and scorecards on both state level and national issues. The organization is therefore capable of making the information from this request available to at least one million people around the country, as well as to relevant members of Congress and other elected officials.

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<sup>16</sup> See <http://content.sierraclub.org/coal/about-the-campaign>.

<sup>17</sup> See <http://earthjustice.org/about>.

<sup>18</sup> See, e.g., Markman, *supra* note 8.

The Environmental Integrity Project (EIP) is a non-profit, non-partisan public interest law organization that was founded to advocate for the effective enforcement of environmental laws that pertain to coal-fired power plants and other large sources of pollution.<sup>19</sup> EIP's three objectives are to: (1) provide objective analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public's health; (2) hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and (3) help local communities in key states obtain the protection of environmental laws. EIP participates in federal and state rulemakings related to water pollution from the utility industry and brings lawsuits to enforce the Clean Water Act on behalf of community and environmental groups that are harmed by coal plant pollution. In addition, EIP uses public data to develop reports, media materials, and litigation briefs that educate the public and decision-makers, and achieve its objectives. For example, EIP, in coordination with Earthjustice, Sierra Club, and other public interest groups, has released several reports documenting water pollution from coal-fired power plants.<sup>20</sup> Most recently, the Public Interest Groups released a detailed report on the dire need for a strong Steam Electric ELGs Rule.<sup>21</sup> These reports are published on EIP's website.

Waterkeeper Alliance (WKA) is a global movement uniting more than 200 Waterkeeper organizations and focusing citizen advocacy on the issues that affect our waterways, from pollution to climate change. WKA has a proven ability to disseminate information quickly and effectively through various communication channels including publications, public interest litigation, educational programs, media initiatives, and its website. WKA's website, [www.waterkeeper.org](http://www.waterkeeper.org), is updated regularly and draws thousands of visits per month. WKA also publishes *WATERKEEPER*, a magazine on water-related environmental and public health subjects of current interest, which is read by approximately 30,000 individuals. *Ripples* is WKA's electronic newsletter on water-related issues that is distributed by email to approximately 8,000 subscribers and made available to the general public online. WKA also issues press releases and participates in press conferences and interviews with reporters. WKA routinely uses FOIA to obtain information from federal agencies that Waterkeepers' legal and scientific experts analyze in order to inform the public about a variety of issues, including clean water, drinking water safety, and energy policy.

The Public Interest Groups will make all documents publicly available and will use them as the bases for reports and review of EPA's Steam Electric ELGs Rule. Thus, the Public Interest Groups are uniquely well positioned to analyze and publicize the information it requests.

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<sup>19</sup> See <http://www.environmentalintegrity.org>.

<sup>20</sup> See, e.g., EIP et al., Closing the Floodgates: How the Coal Industry is Poisoning Our Water and How We Can Stop It (July 23, 2013), available at [http://www.environmentalintegrity.org/news\\_reports/07\\_23\\_2013.php](http://www.environmentalintegrity.org/news_reports/07_23_2013.php); EIP et al., In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and their Environment (Aug. 26, 2010), available at [http://www.environmentalintegrity.org/news\\_reports/08\\_26\\_10.php](http://www.environmentalintegrity.org/news_reports/08_26_10.php); Earthjustice et al., EPA's Blind Spot: Hexavalent Chromium in Coal Ash (Feb. 1, 2011), available at <http://www.environmentalintegrity.org/documents/CoalAshChromeReportFINAL.pdf>.

<sup>21</sup> EIP et al., Closing the Floodgates: How the Coal Industry is Poisoning Our Water and How We Can Stop It (July 23, 2013), available at [http://www.environmentalintegrity.org/news\\_reports/07\\_23\\_2013.php](http://www.environmentalintegrity.org/news_reports/07_23_2013.php).



**iv. The information will contribute “significantly” to public understanding of government operations or activities.**

The information the Public Interest Groups seek will contribute “significantly” to the ongoing public conversation about water pollution from coal-fired power plants.<sup>22</sup> None of the materials the groups have requested are now widely known (if they have been made public at all), yet they are essential to evaluating the basis for EPA’s Steam Electric ELGs Rule. As discussed above, these materials will allow the public and independent experts to critically evaluate EPA’s proposal and provide meaningful comments during the public comment period. Releasing this information (and doing so on a timeline which will allow the public to comment on the rule based upon these records) will, thus, significantly enhance public understanding of the basis for EPA’s proposal and public participation during the public comment period.

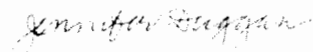
**B. Commercial Interest Factor**

The Sierra Club is a non-profit organization, registered under sections 501(c)(3) and 501(c)(4) of the tax code. Clean Water Action is also a non-profit organization, registered under sections 501(c)(4) of the tax code. Earthjustice and the Environmental Integrity Project are non-profit public interest law organizations. Waterkeeper is a non-profit organization, registered under section 501(c)(3) of the tax code. The Public Interest Groups have no commercial, trade, or profit interests in this information. The Public Interest Groups seek to use this information solely to inform the public and to support advocacy efforts around curbing dangerous and illegal discharges from coal-fired power plants. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted.

Thank you for your assistance processing this request. Please contact Jennifer Duggan at the email or telephone number below if you have any questions or concerns about this request for information.

Sincerely,



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<sup>22</sup> See 40 C.F.R. § 2.107(l)(2)(iv).

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